TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 231

FANNIE E. UNTERMYER, AS EXECUTRIX, AND EDWARD D. UNTERMYER, AS EXECUTOR, OF THE LAST WILL AND TESTAMENT OF ISAAC UNTERMYER, DECEASED, PETITIONERS,

vs.

CHARLES W. ANDERSON, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA FOR THE THIRD DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 15, 1927

CERTIORARI GRANTED MAY 2, 1927

(32,623)

(32,623)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 221

FANNIE E. UNTERMYER, AS EXECUTRIX, AND EDWARD D. UNTERMYER, AS EXECUTOR, OF THE LAST WILL AND TESTAMENT OF ISAAC UNTERMYER, DECEASED, PETITIONERS,

vs.

CHARLES W. ANDERSON, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA FOR THE THIRD DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 6, 1927

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 36-251

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the United States District Court for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Fannie E. Untermyer as Executrix and Edward D. Untermyer as Executor under the Last Will and Testament of Isaac Untermyer, deceased, as plaintiffs and Charles W. Anderson as Collector of Internal Revenue of the United States of America for the Third District of New York, as defendant manifest error has happened to the great damage of the plaintiffs-in-error, as stated and appears by the judgment entered herein on the 22nd day of March, 1927, which dismissed the complaint of the plaintiffs with $30.00 costs in favor of the defendant and against the plaintiffs,

We, being willing that such errors, if any hath been made, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf,

Do hereby command you that, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the Court Rooms of said Court in the Post Office [fol. 2] Building in the City of New York, together with this writ so that you may have the same at said place, before the Judges aforesaid on the 4th day of April, 1927, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct these errors, what of right and according

to law and custom of the United States ought to be done in the premises.

Witness, Honorable William H. Taft, Chief Justice of the United States this 24th day of March, in the year one thousand nine hundred and twenty-seven and the Independence of the United States the one hundred and fifty-first.

Alex Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York.

The foregoing writ is hereby allowed and the amount of the Bond is hereby fixed at $250.00.

Francis A. Winslow, United States District Judge.

[fol. 3] Citation, in usual form, omitted in printing.

[fol. 4] Summons omitted in printing.

[fol. 5] In United States District Court, Southern District of New York

L. 36-251, Calendar No. 869

Isaac Untermyer, Plaintiff,

vs.

Charles W. Anderson, as Collector of Internal Revenue of the United States of America for the Third District of New York, Defendant

Complaint

To the Honorable District Court of the United States for the Southern District of New York:

Plaintiff above named by Guggenheimer, Untermyer & Marshall, his attorneys herein for complaint against the above named defendant, complains and alleges:

First. At all the times hereinafter stated plaintiff was and still is a resident of the Borough of Manhattan of the

City of New York of the County of New York and the State of New York and within the judicial district of the District Court of the United States for the Southern District of New York.

Second. For some time prior to January 1st, 1925, and up to the time of the commencement of this action the defendant herein was and he still is the duly appointed, duly qualified and acting Collector of Internal Revenue of the [fol. 6] United States in and for the Southern District of the State of New York.

Third. On or about April 1st, 1925, in compliance with the Act of Congress of June 2nd, 1924, known as the Federal Revenue Act of 1924, and pursuant to the provisions of Section- 319, 320, 321, 322 and 324 of said Act, the plaintiff made a return for the twelve months ending December 31st. 1924, setting forth an itemized inventory of gifts made by plaintiff during the calendar year of 1924, showing the nature and character of certain gifts which the plaintiff had made during said year and showing that the fair market value of the property covered by such gifts as of the date of the gifts aggregated the sum of $193,100; that there was deductible therefrom charitable gifts which as of the date of the making thereof were of the fair value of $600; that the deductions from the value of said gifts amounted to $50,600; that the amount of such gifts as taxable under the provisions of the Act referred to was the sum of $142,500; and that the tax thereon on the basis of the provisions of the Revenue Act of 1924, above referred to was the sum of $2,775. Said return was made under protest.

Fourth. On or about April 1st, 1925, acting solely under duress and compulsion the plaintiff in order to avoid the imposition and collection of penalties and interest charges on the amount of the aforesaid claimed tax paid to the defendant under protest the said sum of $2,775 with accrued interest thereon to that date amounting to the sum of $7.86, or in all the sum of $2,782.86. At the time of and with the making of said payment plaintiff caused to be delivered to [fol. 7] the defendant a protest in writing, a copy of which is hereto annexed as Exhibit A, which is made a part of this complaint as though here fully and at length set forth.

At the time of making such payment the plaintiff received from the defendant a receipt or written acknowledgment of said payment, a copy of which writing is hereto annexed as Exhibit B, which is made a part of this complaint as though here fully and at length set forth.

Fifth. Thereafter and on or about April 3rd, 1925, plaintiff duly filed with the defendant herein a claim for the refund of said taxes so paid and the interest thereon in the form hereto annexed, marked Exhibit C, which is hereby made a part of this complaint as though here fully and at length set forth. Attached to Exhibit C herein referred to was a copy of Exhibit A hereto annexed.

Sixth. More than six months have elapsed since the filing of the claim mentioned in paragraph Fifth of this complaint.

Seventh. On or about August 3rd, 1925, the Commissioner of Internal Revenue of the Treasury Department of the United States rejected the plaintiff's aforesaid claim for refund in its entirety, which rejection is shown by a letter writing dated August 3rd 1925, a copy of which is hereto annexed and marked Exhibit D, which is made a part of this complaint as though here fully and at length set forth.

Eighth. Upon information and belief, the tax so assessed and collected by the defendant herein from the plaintiff, amounting to the sum of $2,775, together with the claimed interest thereon amounting to $7.86, was unlawfully collected from the plaintiff on the following grounds, viz:

[fol. 8] (1) That the so-called Gift Tax is unconstitutional and void, in that plaintiff was thereby without due process of law deprived of (a) property belonging to him and of an essential attribute of such property and (b) of the liberty to dispose of his property, in violation of Article V of the Amendments to the Constitution of the United States.

(2) That the tax sought to be imposed upon plaintiff because of the making of such gifts is not a valid exercise of the taxing power vested in the Congress of the United States.

(3) That such tax is neither an income tax, an excise tax, a death duty, an estate or succession tax, nor an impost, authorized by the Constitution of the United States, but is a direct tax not laid in proportion to the census and enumeration directed to be taken pursuant to the Constitution and is therefore violative of Article I, Section 9, subdivision 4, of the Constitution of the United States.

(4) That Congress in any event had no right, power or authority to levy or assess against the plaintiff any tax upon gifts which plaintiff had made in absolute form prior to June 2nd, 1924, and that the gifts covered by the return of the plaintiff were all made prior to June 2nd, 1924, and before the adoption of the Revenue Act of Congress of 1924.

Ninth. By reason of the matters herein before stated, there is now due and owing to the plaintiff from the defendant the sum of $2,782.86 with interest thereon from April 1st, 1925.

Tenth. The matters in controversy herein arise under and require the construction of the Constitution of the United States and the laws of the United States of America.

[fol. 9] Wherefore plaintiff demands judgment in his favor and against the defendant for the said sum of $2,782.86 with interest thereon from April 1st, 1925, together with the costs and disbursements of this action.

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiff.

Office and Post Office Address: 120 Broadway, Borough of Manhattan of the City of New York.

Duly sworn to by Isaac Untermyer. Jurat omitted in printing.

[fol. 10] EXHIBIT A TO COMPLAINT

New York, April 1, 1925.

To the Collector of Internal Revenue, Third District, New York:

I protest against being assessed for a tax upon the gifts made by me during the calendar year 1924 as herein reported purusant to Section 319 of the Act of Congress of June 2, 1924, on the following grounds, among others:

(1) That the so-called Gift Tax is unconstitutional and void, in that I would be thereby deprived of (a) property belonging to me and of an essential attribute of such property and (b) of the liberty to dispose of my property, without due process of law, in violation of Article V of the Amendments to the Constitution of the United States.

(2) That the tax sought to be imposed upon me because of the making of such gifts, is not a valid exercise of the taxing power vested in the Congress of the United States.

(3) That such a tax is neither an income tax, an excise tax, a death duty, an estate or succession tax, nor an impost, authorized by the Constitution of the United States, but is a direct tax not laid in proportion to the census and enumeration directed to be taken pursuant to the Constitution, and is therefore violative of Article 1, Section 9, subdivision 4, of the Constitution of the United States.

For the reasons aforesaid, this return is made under coercion, and is not to be regarded as in any way a waiver of my right to object to the enforcement of such tax and to contest the validity of any assessment or determination that may be made requiring the payment of such tax; and [fol. 11] that yielding to the duress imposed by Section 324 of the aforesaid Act of June 2, 1924, in order to avoid the threatened seizure of my property and the incurring of the penalties prescribed by the law in the event of the failure to pay such tax on or before March 15, 1925, I hereby make payment of such tax under protest, and notify you that I shall institute legal proceedings against you for the recovery of the sum so paid, which has been unlawfully and against my will and under duress exacted from me.

Issac Untermyer.

EXHIBIT B TO COMPLAINT

Form 802 A—December, 1924

Treasury Department, Internal Revenue Service

Gift Tax Receipt

Donor's Copy (in Duplicate)

Collector 3rd District of New York, at 250 West 57th St., N. Y. C.

Actual date of payment: Apr. 1, 1925.

NOTE.—Payment of the tax indicated by the return on Form 706-A is not conclusive as to ultimate tax liability. An investigation will be conducted to verify the accuracy of the return. If tax in excess of or less than the amount indicated by the return is disclosed by the Commissioner's audit, due notice thereof will be given.

Isaac Untermyer, 120 Broadway, New York City.
[fol. 12] List 23A, (Month) April, (Page) 1925, Line —, Calendar Year 1925.

Returned tax	$2,775 00
Total	$2,775 00

(Stamp:) Office of the Collector of Internal Revenue, Third District, New York. B. Received April 1, 1925, with Remittance. B.

Form 803 A—December, 1924

Treasury Department, Internal Revenue Service

Gift Tax Receipt

Donor's Copy (in Duplicate)

Collector 3rd District New York, at 250 West 57th, St., N. Y. C.

Actual date of payment: April 1st, 1925.

NOTE.—Payment of the tax indicated by the return on Form 706-A is not conclusive as to ultimate tax liability.

An investigation will be conducted to verify the accuracy of the return. If tax in excess of or less than the amount indicated by the return is disclosed by the Commissioner's audit, due notice thereof will be given.

Isaac Untermyer, 120 Broadway, New York City.
[fol. 13] List 23A, (Month) April, (Page) 1925, Line —, Calendar Year 1924.

Interest 16 days 6%	$7.86
Total	$7.86

(Stamp:) Office of the Collector of Internal Revenue, Third District, New York. B. Received April 1, 1925, with Remittance. B.

EXHIBIT C TO COMPLAINT

Form 843—Jan., 1922

Treasury Department, Internal Revenue Service

Claim for Refund of Taxes Illegally Collected

STATE OF NEW YORK,
County of New York, ss:

Isaac Untermyer, 300 Park Avenue, New York, N. Y. 120 Broadway, New York, N. Y.

(Stamp:) Office of the Collector of Internal Revenue, Third District, New York. 10. Received Apr. 3, 1925. No Remittance. 10.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of [fol. 14] the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From Jan. 1	1924
To Dec. 31	1924

1. Business in which engaged: Law.
2. Character of assessment or tax: 1924 Gift tax.
3. Amount of assessment or stamps purchased: $2,775.00.

4. Reduction of Tax Liability requested (Income and Profits Tax) & interest: $7.86.

5. Amount to be abated: none. $2,782.86.

6. Amount to be refunded (or such greater amount as is legally refundable) exclusive of int.: $2,782.86.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): From Apr. 1; Apr. 1, 1925.

8. District in which return (if any) was filed: Third New York.

9. District in which unpaid assessment appears: None unpaid.

10. Amount of overpayment claimed as credit: None.

11. Unpaid assessment against which credit is asked; period from: None.

Deponent verily believes that this application should be allowed for the reasons stated in a letter of protest filed with the Collector of Internal Revenue of the Third District of New York on April 1, 1925 as a part of my 1924 Gift Tax Return, a true copy of which is hereto annexed [fol. 15] and is made a part of this claim of refund as though here and at length fully set forth.

I attach hereto a copy of an original letter under which the said collecter acknowledges receipt of my said return and payment of the tax.

I request and hereby demand a hearing on this claim, notice of which is requested to be sent to me at above mentioned business address.

(Signed) Isaac Untermeyer, 120 Broadway, New York, N. Y.

Sworn to and subscribed before me this 2nd day of April, 1925. Louis Malthaner, Notary Public, Kings Co., No. 168. Kings Register No. 6171. Certificate filed in New York County No. 432. New York Register's No. 6369. My commission expires March 30, 1926. (Seal.)

[fol. 16] EXHIBIT D TO COMPLAINT

Treasury Department, Washington, Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to MT-ET-GT-1-C1. R-EBT.
District of Second New York.
Gifts made by Isaac Untermyer.
Calendar Year 1924.

August 3, 1925.

Isaac Untermyer, Esq., 120 Broadway, New York, N. Y.:

SIR: The Bureau has examined the claim filed by you for refund of $2,782.86, gift tax paid under the provisions of the Revenue Act of 1924.

Your claim is based on the contention that the gift tax law, under which this tax was paid, is unconstitutional and void.

The Bureau, being an administrative unit, is not authorized to pass upon the constitutionality of this Act, nor has it been brought to the attention of the Bureau that the unconstitutionality of the Act has been judicially determined by any court of competent jurisdiction. Until this is done, the Bureau has no alternative but to strictly comply with the express provisions of the law as enacted by Congress.

Therefore, your claim for refund of $2,782.86 is rejected in its entirety.

[fol. 17] For your information, you are advised that the Bureau has not, as yet, audited this case, nor determined the tax liability.

Respectfully, D. H. Blair, Commissioner.

MHP.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The defendant above-named, by his attorney, Emory R. Buckner, United States Attorney for the Southern District of New York, answering the complaint herein, denies:

First. Upon information and belief, each and every allegation contained in paragraph numbered "Eighth" of the complaint.

[fol. 18] Second. Upon information and belief, each and every allegation contained in paragraph numbered "Ninth" of the complaint.

Wherefore, defendant demands judgment dismissing the complaint together with the costs of this action.

Emory R. Buckner, United States Attorney for the Southern District of New York, Attorney for Defendant.

Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Duly sworn to by Charles W. Anderson. Jurat omitted in printing.

[fol. 19] In United States District Court

[Title omitted]

Order Reviving Action—October 9, 1926

Upon the subjoined consent of Emory R. Buckner, United States Attorney, as attorney for the defendant in the above entitled action, and on motion of Guggenheimer, Untermyer & Marshall, the atorneys for Fannie E. Untermyer as executrix and Edward D. Untermyer as executor of the Last Will and Testament of Isaac Untermyer, deceased, who died August 31, 1926, it is hereby

Ordered that the above entitled action be and the same hereby is revived in favor of Fannie E. Untermyer as executrix and Edward D. Untermyer as executor of the Last Will and Testament of Isaac Untermyer, deceased, as plaintiffs in this action, and it is further

[fol. 20] Ordered that the said action hereby stands revived in behalf of said Fannie E. Untermyer as executrix and Edward D. Untermyer as executor under the Last Will and Testament of Isaac Untermyer, deceased, as parties plaintiff herein, and that the title of this action be and the

same hereby is amended accordingly without prejudice to any of the proceedings had in this action.

F. A. Winslow, U. S. D. J.

I hereby approve the form of the foregoing order and consent to the making and entry thereof without notice.

Dated, New York, October 8th, 1926.

Emory R. Buckner, United States Attorney, Attorney for Defendant.

[fol. 21] In United States District Court

[Title omitted]

Minute Entry—March 18, 1927

Now comes the plaintiff by their Attys., Guggenheimer, Untermyer & Marshall & Louis Marshall of counsel, and moves the trial of this cause. Likewise come the defendant by his Atty., E. R. Buckner & Thos. J. Crawford of counsel.

Thereupon a jury is duly impaneled and sworn and the cause proceeds to trial. At close of entire case Plff.'s Atty. [fol. 22] moves for a direction of a verdict for Plff. Denied, Exc. Deft.'s Atty. moves for a direction of a verdict for Deft. & for a dismissal of the complaint. Motion granted. Court directs verdict for Deft. & dismisses complaint. Ex. for Plff.

An Extract of the Minutes.

Alex. Gilchrist, Jr., Clerk.

A Copy. W. J. E.

In United States District Court, Southern District of New York

L. 36-251

Fannie E. Untermyer, as Executrix, and Edward D. Untermyer, as Executor, under the Last Will and Testament of Isaac Untermyer, Deceased,

vs.

Charles W. Anderson, as Collector of Internal Revenue of the United States of America for the Third District of New York

Judgment—Filed March 22, 1927

The issues in this action having been regularly brought on for trial before the Hon. Francis A. Winslow and a jury at a stated term of this court, held on the 18th day of March, 1927, at the United States Court and Post Office Building, [fol. 23] in the Borough of Manhattan, City of New York, and the plaintiff herein appearing by Guggenheimer, Untermyer & Marshall, Louis Marshall, Esq., of counsel, and the defendant appearing by Emery R. Buckner, United States Attorney for the Southern District of New York, Thomas J. Crawford, Assistant United States Attorney, of counsel, and the allegations and proofs on behalf of the plaintiff and the defendant having been heard and considered, and thereafter at the close of the testimony the attorneys for the plaintiff having moved for the direction of a verdict in favor of the plaintiff, which motion was denied and an exception was allowed to plaintiff, and the attorney for the defendant having moved for a direction in favor of the defendant and for a dismissal of the complaint, and this Honorable Court having directed that a verdict be entered in favor of the defendant and that the complaint be dismissed, the plaintiff being allowed an exception to such ruling, and the defendant's costs having been taxed at the sum of $30.00 by the Clerk of this court,

Now, on motion of Emory R. Buckner, United States Attorney, attorney for the defendant, it is

Ordered, Adjudged and Decreed that the complaint of the plaintiffs in this action be and the same hereby is dismissed upon the merits, and it is further

Ordered and Adjudged that the defendant Charles W. Anderson, as Collector of Internal Revenue of the United States of America for the Third District of New York, recover of the plaintiffs Fannie E. Untermyer, as Executrix, [fol. 24] and Edward D. Untermyer, as Executor, under the Last Will and Testament of Isaac Untermyer, deceased, the sum of $30.00 costs as taxed, and that execution issue therefor.

Judgment signed this 22nd day of March, 1927.

Alex Gilchrist, Jr., Clerk.

In United States District Court

[Title omitted]

Bill of Exceptions

Caption

This cause came on for trial before Hon. Francis A. Winslow, United States District Judge and a jury in the [fol. 25] United States District Court of the Southern District of New York on the 18th day of March, 1927.

Guggenheimer, Untermyer & Marshall, of New York City, appeared as attorneys for the plaintiffs and Louis Marshall, of Counsel.

The defendant appeared by Emory R. Buckner, Esq., United States Attorney for the Southern District of New York and Thomas J. Crawford, Esq., Assistant United States Attorney, of Counsel.

A jury was empanelled and sworn.

The following agreed statement of facts was then read on behalf of the plaintiffs:

Agreed Statement of Facts

First: At all the times hereinafter stated Isaac Untermyer was a resident of the Borough of Manhattan, of the City of New York, of the County of New York and the State of New York, and within the judicial district of the District Court of the United States for the Southern District of New York. He died August 31, 1926, and by order of this

Court dated October 9, 1926, the plaintiffs herein were substituted as parties plaintiffs to this action without prejudice to the proceedings had in the action.

Second. For some time prior to January 1st, 1925, and up to the time of the commencement of this action the defendant herein was and he still is the duly appointed, duly qualified and acting Collector of Internal Revenue of the United States in and for the Third District of the State of New York.

Third. On or about April 1st, 1925, in compliance with the Act of Congress of June 2nd, 1924, known as the Federal Revenue Act of 1924, and pursuant to the provisions [fol. 26] of Sections 319, 320, 321, 322 and 324 of said Act, the plaintiffs' testator made a return for the twelve months ending December 31st, 1924, setting forth an itemized inventory of gifts made by plaintiffs' testator during the calendar year of 1924, showing the nature and character of certain gifts which the plaintiffs' testator had made during said year and showing that the fair market value of the property covered by such gifts as of the date of the gifts aggregated the sum of $193,100; that there was deductible therefrom charitable gifts which as of the date of the making thereof were of the fair value of $600; that the deductions from the value of said gifts amounted to $50,600; that the amount of such gifts as taxable under the provisions of the Act referred to was the sum of $142,500; and that the tax thereon on the basis of the provisions of the Revenue Act of 1924, above referred to, was the sum of $2,775. Said return was made under protest.

Fourth. On or about April 1st, 1925, acting solely under duress and compulsion the plaintiffs' testator in order to avoid the imposition and collection of penalties and interest charges on the amount of the aforesaid claimed tax paid to the defendant under protest the said sum of $2,775, with accrued interest thereon to that date, amounting to the sum of $7.86, or in all the sum of $2,782.86. At the time of and with the making of said payment, plaintiffs' testator caused to be delivered to the defendant a protest in writing, a copy of which is annexed to the complaint as Exhibit A, which is made a part of this agreed statement of facts as though here fully and at length set forth. At the time of making

such payment the plaintiffs' testator received from the defendant a receipt or written acknowledgment of said pay-
[fol. 27] ment, a copy of which writing is annexed to the complaint as Exhibit B, which is made a part of this agreed statement of facts as though here fully and at length set forth.

Fifth. Thereafter and on or about April 3rd, 1925, plaintiffs' testator duly filed with the defendant herein a claim for the refund of said taxes so paid and the interest thereon in the form annexed to the complaint, marked Exhibit C, which is hereby made a part of this agreed statement of facts as though here fully and at length set forth. Attached to Exhibit C herein referred to was a copy of Exhibit A, hereinbefore referred to.

Sixth. More than six months have elapsed since the filing of the claim mentioned in Paragraph Fifth of this agreed statement of facts.

Seventh. On or about August 3rd, 1925, the Commissioner of Internal Revenue of the Treasury Department of the United States rejected the plaintiffs' aforesaid claim for refund in its entirety, which rejection is shown by a letter writing dated August 3rd, 1925, a copy of which is annexed to the complaint and marked Exhibit D, which is made a part of this agreed statement of facts as though here fully and at length set forth.

Eighth. That the gift made by plaintiffs' testator upon which the tax herein referred to was imposed was made on the 23rd day of May, 1924.

Mr. Marshall, on behalf of the plaintiffs, offered in evidence the following documents:

OFFERS IN EVIDENCE

1. Letter of protest of Isaac Untermyer, dated April 1, 1925, a copy of which is attached to the complaint herein as Exhibit A.
[fol. 28] The same was received and marked in evidence as Plaintiffs' Exhibit 1.

2. The two receipts of the Collector of Internal Revenue for $2,775.00 and $7.86 respectively, showing the payment of the gift tax in question, copies of which are attached to the complaint as Exhibit B.

The same were received and marked in evidence as Plaintiffs' Exhibit 2.

3. The application for the refund of the tax in question, a copy of which is attached to the complaint herein as Exhibit C.

The same was received and was marked in evidence as Plaintiffs' Exhibit 3.

4. The letter of the Commissioner of Internal Revenue of August 3rd, 1925, which rejected the refund claim, a copy of which is attached to the complaint herein as Exhibit D.

The same was received in evidence and was marked Plaintiffs' Exhibit 4.

5. The stipulation entered into between the attorneys for the parties hereto, dated March 15th, 1927, under which it was agreed that the amount of the recovery prayed for by the plaintiffs be reduced by the sum of $420.93, on account of a refund made to the plaintiffs on account of said gift tax because of the retroactive provisions of the Revenue Act of 1926 which reduced the gift tax by said amount, which refund was accepted by the plaintiffs' testator without prejudice to his claim that the gift tax in question was unconstitutional, illegal, null and void, and without prejudice to his rights in this action to recover the sum of $2,782.86, less, however, the amount so refunded.

[fol. 29] The plaintiffs then rested their case.

The defendant rested.

Thereupon Mr. Marshall moved the Court, as follows:

MOTION FOR DIRECTED VERDICT FOR PLAINTIFF

"I move for the direction of a verdict in favor of the plaintiff and for judgment against the defendant for the sum of $2,361.93, with interest thereon from April 1, 1925, on the following grounds:

(1) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of property without due process of law.

(2) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the liberty of disposing of his property without due process of law.

(3) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of one of the essential attributes of the property which was the subject of the gift on which a tax has been levied, namely, the right to dispose [fol. 30] of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right.

(4) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the provisions of the Revenue Law imposing a gift tax are in legal effect the equivalent of a prohibition against the making of a gift and constitute an impairment of the right of disposition by imposing restrictive conditions upon the exercise of such right.

(5) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States,

in that the tax upon the donor is in effect one upon the exercise of one of the fundamental rights incident to the ownership of property, the tax being imposed upon the donor in connection with the exercise of that right and his exercise of such right not being a privilege derived from any statutory authority or governmental license or consent.

(6) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax imposed upon the donor because of the [fol. 31] making of the gift is not predicable upon a valid exercise of the taxing power vested in Congress, and the imposition of such tax is in the nature of an act of confiscation.

(7) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the tax imposed is neither an income tax, an excise tax, a death duty, an estate or succession tax, nor an impost tax, authorized by the Constitution of the United States, but constitutes a direct tax not laid or imposed in proportion to the census and an enumeration directed to be taken pursuant to the Constitution of the United States, and is violative of Article I, Section 9, subdivision 4, of the Constitution of the United States.

(8) That the provisions of Sections 319, 320, et seq., of the Revenue Law of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that Congress did not have the right, power or authority under the Constitution of the United States to levy or assess any tax upon executed gifts made inter vivos, and the gift here in question was concededly such a gift and not a gift causa mortis.

(9) That the provisions of Sections 319, 320, et seq., of the Revenue Act of June 2, 1924, did not apply to the gift made by the plaintiffs' testator on May 23, 1924, and that the terms of the said statutes were not retroactive.

The motion for a direction of a verdict in favor of the plaintiffs was denied.

An exception was allowed by the Court to counsel for the plaintiffs to the denial of such motion.

[fol. 32] Motion for Directed Verdict for Defendant

Thereupon Mr. Crawford moved for a direction of a verdict in favor of the defendant and for a dismissal of the Complaint upon the authority of Anderson, Collector v. McNair, decided January 10, 1927, by the United States Circuit Court of Appeals for the Second Circuit. Such motion was granted.

The plaintiffs' counsel was allowed an exception by the Court to the direction of a verdict in favor of the defendant.

Verdict

Thereupon, in accordance with the direction of the Court, the jury rendered a verdict in favor of the defendant.

Notes re Plaintiffs' Exhibits 1 to 4, inc.

Plaintiffs' Exhibit 1

Letter of protest of Isaac Untermyer, dated April 1, 1925, a copy of which is attached to the complaint herein as Exhibit A (printed at p. 10 of this record).

Plaintiffs' Exhibit 2

Two tax receipts of Collector of Internal Revenue for the payment of the gift tax in question, copies of which are attached to the complaint herein as Exhibit B (printed at pp. 10 and 11 of this record).

Plaintiffs' Exhibit 3

Application for refund of tax in question, a copy of which is attached to the complaint herein as Exhibit C (printed at p. 13 of this record).

Plaintiffs' Exhibit 4

Letter of Commissioner of Internal Revenue of August 3rd, 1925, rejecting refund claim, a copy of which is attached to the complaint herein as Exhibit D (printed at p. 16 of this record).

[fol. 33] Plaintiffs' Exhibit 5

Stipulation for reduction of amount of judgment prayed for by plaintiffs by $420.93, or to the sum of $2,361.93, with interest from April 1, 1925, a copy of which stipulation is as follows:

PLAINTIFFS' EXHIBIT 5

Stipulation Reducing Amount of Judgment Claimed by $420.93

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 36-251, Calendar No. 869

FANNIE E. UNTERMYER, as Executrix, and EDWARD D. UNTERMYER, as Executor, under the Last Will and Testament of Isaac Untermyer, Deceased, Plaintiffs,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue of the United States of America for the Third District of New York, Defendant

It is hereby stipulated and agreed by and between the parties to the above entitled action that since the commence-[fol. 34] ment thereof and on August 4, 1926 there was refunded to Isaac Untermyer, now deceased, the original

party plaintiff, the sum of $420.93 on account of the Gift Tax sued upon herein, which amount so refunded represents a reduced amount of the tax originally assessed under the retroactive provisions of the Revenue Act of 1926 which refund was accepted by said Isaac Untermyer upon the understanding and agreement that the acceptance thereof should be without prejudice to his claim that the Gift Tax is unconstitutional, illegal, null and void and also without prejudice to his rights in the above action to recover the $2,782.86 gift tax paid less however the amount so refunded.

Dated, March 15, 1927.

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiffs. Emory R. Buckner, United States Attorney for the Southern District of New York, Attorney for Defendant.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO BILL OF EXCEPTIONS

It is hereby stipulated and agreed that the foregoing Bill of Exceptions is hereby agreed to and that it constitutes a true and correct transcript of the minutes of the trial and the exhibits offered in evidence, and that the same constitutes all of the evidence adduced upon the trial and that the said record as so printed may be ordered on file as the Bill of Exceptions in this case.

Dated, New York, March 31, 1927.

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiffs-in-Error. Emory R. Buckner, United States Attorney for the Southern District of New York, Attorney for Defendant-in-error.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS

Upon the foregoing stipulation of the attorneys for the respective parties hereto, the within Bill of Exceptions is hereby settled and ordered on file.

Dated, April 1, 1927.

Francis A. Winslow, United States District Judge for the Southern District of New York.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

And now comes Fannie E. Untermyer, as Executrix, and Edward D. Untermyer, as Executor, of the Last Will and Testament of Isaac Untermyer, deceased, and file these their assignment of errors, upon which they rely upon the prosecution of their errors in the above entitled cause from the judgment entered herein by this Court on the 22nd day of March, 1927, and aver that the District Court of the United States for the Southern District of New York, in the course of the trial of this action and in connection with the rendition of the verdict of the jury herein, did make the following errors, viz.:

First. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and [fol. 38] void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of property without due process of law.

Second. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the

Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provisions contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the liberty of disposing of his property without due process of law.

Third. In that the District Court erred in refusing to hold the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of one of the essential attributes of the property which was the subject of the gift on which a tax has been levied, namely, the right to dispose of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right.

Fourth. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth [fol. 39] Amendment to the Constitution of the United States, in that the provisions of the Revenue Law imposing a gift tax are in legal effect the equivalent of a prohibition against the making of a gift, and constitute an impairment of the right of disposition by imposing restrictive conditions upon the exercise of such right.

Fifth. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax upon the donor is in effect one upon the exercise of one of the fundamental rights incident to the ownership of property, the tax being imposed upon the donor in connection with the exercise of that right and his exercise of such right not being a privilege derived from any statutory authority or governmental license or consent.

Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provisions contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the liberty of disposing of his property without due process of law.

Third. In that the District Court erred in refusing to hold the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of one of the essential attributes of the property which was the subject of the gift on which a tax has been levied, namely, the right to dispose of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right.

Fourth. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth [fol. 39] Amendment to the Constitution of the United States, in that the provisions of the Revenue Law imposing a gift tax are in legal effect the equivalent of a prohibition against the making of a gift, and constitute an impairment of the right of disposition by imposing restrictive conditions upon the exercise of such right.

Fifth. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax upon the donor is in effect one upon the exercise of one of the fundamental rights incident to the ownership of property, the tax being imposed upon the donor in connection with the exercise of that right and his exercise of such right not being a privilege derived from any statutory authority or governmental license or consent.